

A Letter to My Successor

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This letter was written by Robert Rack when he retired as Chief Circuit Mediator for the U.S. Sixth Circuit Court of Appeals and the court was posting the announcement to fill that position. Only slight modifications, such as the addition of headings, have been made in order to comply with the journal's standards. While the informal letter format of this "article" is unusual, it is published in part for the perspective it offers on how the administration of a court-based mediation program affects the qualities of the services ultimately delivered.

Dear Successor:

After almost twenty-nine years I decided to retire and you have been selected to replace me. Congratulations. As the familiar refrain goes, I never thought I'd be here this long. When I promised Chief Judge Edwards I'd stay two years he growled that he saw this as a career position. It turned out he was right, about that and many other things.

You are inheriting an office and program that occupies a unique, nontraditional, and delicate place within the Judiciary. It was invented from scratch and has been deliberately developed over time through trial and error and in response to regular self-evaluation. There are few people outside the office who know the history and reasons behind all our current practices and procedures, and it occurs to me that it might be helpful to you if I explain some of how and why things came to be set up the way they are. I'll try to confine myself to observations more unique to my position, ones you may not find elsewhere but which are fairly entrenched in the program as you come to it.

It goes without saying that you will bring your own ideas, talents, and ambitions to this job. Sooner or later you will want to make changes, will need to make changes. I hope this letter explains a coherence of values, policies, practices, and procedures that will aid you in directing the program and making those changes well.

First, welcome to a really great job! Most of us in these mediation positions pinch ourselves periodically to be sure it's real. To be able to do this rewarding work without the business pressures of a private practice, with a constant flow of interesting cases and people, and with institutional autonomy that spared us from most of the bureaucratic and political demands of a large government institution, has been a blessing we cultivated, appreciated, and protected. Much of what I will say here addresses this last sentence.

I. ATTITUDE

Attitude seems like an odd choice of words, but I'm not sure what else to call it.

I approached this job from the beginning with an entrepreneurial attitude. Court employment of staff mediators was a new concept, a better mouse trap, a new enterprise. Litigants would be our customers, and it would have to be profitable to the court. The principle profit measure has shifted somewhat over the years from "savings," resulting from earlier and added case terminations, to "value added" by provision of a high quality and valued service to litigants. Notwithstanding the shift in emphasis, I still think of the lawyers we deal with and their clients as customers whose needs and interests we are here to satisfy. My mantra in countless bar presentations was, "Tell me what you like and don't like because if the program is not working for you, it's not working."

I mention this because there is another attitude sometimes found in government that would not be hard to fall into here: We are the court, the authority; we make the rules, issue orders, dispense justice and make decisions; litigants come to us because they must, and we impose the structure and procedures to which they are required to adhere. The fact is that lawyers are accustomed to showing deference to judges, for obvious reasons, and will treat mediators similarly if they think we want them to. It would be easy for court mediators to try to enhance our esteem by raising our profile and being authoritative. I believe, however, the higher our profile and the more authoritative we act, the less effective and more frustrated we become in this work. I assume not everyone agrees with this, but I think it's true.

So, we kept our focus on the litigants as customers, trying to identify their needs and wants and trying to meet them. Litigants come to the court to get the best possible outcomes to intractable problems, and we help them achieve their goals. The judges offer an adversarial process and third-party decisions. We offer an alternative, more collaborative process for reaching voluntary decisions. Sometimes emotions and adversarial zeal obstruct a person's ability to look at problems and solutions collaboratively. That is where a mediator can help. That has been our service, the value added. Every rule, procedure, and technique we have developed has been crafted to assist people in reaching voluntary resolutions of their disputes.

Social attitudes about government and courts may shift, but in my view this approach should always be safe, sound, and appropriate.

II. INTEGRATION WITH THE COURT

The risks and complexities of integrating an off-the-record, confidential procedure into a highly structured, traditional, rule-bound institution cannot be minimized. Protecting the integrity of each, mediation and adjudication, has required vigilance. There are at least two dimensions of interface or integration I'd like to discuss which we might refer to as substantive and procedural.

Probably the most critical substantive issues concern confidentiality—confidentiality in fact and appearance—which I'll address separately below. Others relate to how lightly or heavily mediators wear the mantle of the court when injecting themselves into litigants' cases. I'll start with these more nuanced issues.

Mediation conferences are mandatory, at least as to attendance. This really is part of the service offered since it allows lawyers and clients to attend without having to request the mediation or even look particularly interested. No one wants to look too eager or weak.

Scheduling notices sent pursuant to Rule 33 of both the Federal Rules of Appellate Procedure and Sixth Circuit Rules amount to court orders to appear. In the early years of the program there were a handful of challenges to the attendance requirement. Most of these were resolved by compliance following the issuance of show cause orders by the clerk at our behest (and without judicial involvement). One or two appellants were dismissed, and one or two appellees were blocked from orally arguing their cases after they failed to comply with the show cause orders. Failures to appear for scheduled conferences today are almost always honest calendaring mistakes or sloppy law practice, but no one challenges the authority of the office to call them to the conference.

I turned myself inside out over the years to avoid bringing conflicts or problems to our judges. I can count on one hand the number of times I've asked the judges for help with an administrative problem or a case related problem that wasn't being sought at the request of all parties to a case. Maybe I was being overly cautious, but because this was a new and experimental program I was loath to create controversy. This was especially true for issues involving our authority or power over litigants.

We never wanted to be seen as enforcers. We wanted to be "those guys from the federal government who are here to help." Finding the right balance between the goal of providing a safe, non-coercive environment for open and candid problemsolving on one hand, and the need to get people's attention and protect the integrity of the process on the other, was always a little tricky. My admittedly skewed view was that I was there to help parties find

mutually agreeable solutions, and using coercion to get there was like screaming at a child to be quiet. Used very rarely, that might have some effectiveness for its shock value, but as a frequent or long term strategy it's more likely to be counterproductive. Litigators tend to be warriors; it's how they're wired and what they do. Once they perceive that we are engaging them from a competitive or adversarial stance, the chances of getting candor and collaboration from them drop. For these reasons we have kept the fist of the court's powers and the sanctions provision of our mediation rule wrapped in a very soft glove.

This is not to say we forgot or discounted the fact that we were part of the court. A little formality goes a long way in tempering litigants' emotional and competitive behavior. There is no doubt that being high-level court officials has enabled us to bring people to the table, keep them at the table, and manage the discussions fairly easily. It also gives credibility to the mediators' observations and suggestions about legal issues and settlement positions. Both are invaluable contributions to settlement negotiations.

I don't mean to belabor the topic of our relationship with the court, but I really do see it as quite important. If your background is private mediation or law practice, you may be surprised at the difference you'll find in how you are seen and treated by the lawyers in your role here. If you came from court staff or a judicial background, you may be unconscious of the ways lawyers' views of and responses to you are affected by the power they perceive that you have over their professional lives and success. You may be ready to change hats from judge to mediator, but litigants will still see your robes. That status and its advantages can be hard to give up. My view on this might be a little extreme, but what makes mediation a true alternative to adjudication is precisely the element of party self-determination. Thus, I see the mediator's job as assisting or coaching people in their negotiations to find their own mutually agreeable outcomes. From this perspective, having and using the power to coerce, however subtly, is not really mediating.

Interfacing with the court's formal case processing procedures has also been important. You'll find the staff in this office well attuned to the practices and procedures of the other court offices, especially the clerk's office. One of my founding principles was to respect the court's central staff and procedures as primary and to minimize our interference with their work. So, for instance, we kept no official clerk's files in our office that we might misplace, we modeled our forms on the clerk's, and we designed almost all of our procedures to avoid delaying or interfering with their routine case management responsibilities. In fact, we have provided back-up or assistance to deputy clerks whenever possible.

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Similarly, we set up our case selection criteria to prevent overlap with the staff attorney's work, and typically avoided scheduling cases in which a dispositive motion had already been filed. We deliberately sought to avoid interoffice competitions or turf battles, and for the last twenty or twenty-five years, this goal has largely been met. Of course personalities can sometimes rub and conflicts may occur, but at the policy level, my view was that our work was separate and independent. Where we unavoidably interacted with another office, we tried to fit our procedures into theirs.

That philosophy seems to have worked. As I write this, our relationships with the other offices are good and cooperative. The motions attorneys will coordinate presentation of new motions to panels with our mediation work, sometimes delaying presentation until negotiations are completed. The clerk's office delegates control over briefing schedules to our office. This includes direct docket entries in cases we are mediating. These arrangements and others have provided court-wide efficiencies, with rippling budgetary benefits and operational advantages to all the respective offices.

III. CONFIDENTIALITY

This may well be the most critical dimension of our interface with the court. The Sixth Circuit's mediation rule says, roughly, that neither the mediators nor the parties may disclose mediation communications to the judges of this court. Let's set aside for a moment the can of worms we open with discussion about disclosure to others outside the court, to other courts, or to the press, which could result indirectly in disclosure to our judges, and address confidentiality just between this office and this court.

I think it's safe to say that most lawyers now believe that what they say is never shared directly or indirectly with judges. It took years to build that trust. I believe that trust is critical to their willingness to talk openly with us, and that their openness affects the mediator's ability to ferret out their interests and thus to construct acceptable settlement options.

The court shares that commitment to confidentiality theoretically, but in my experience judges believe they can keep confidential information separate from their decisionmaking and so are not as concerned with violations of the rule as we are. If we learned of a disclosure of a mediation communication in someone's brief, we either called the offending lawyers and urged them to withdraw the brief and re-file without the disclosure, or asked the clerk to send it back and require corrective changes. When one party reneged on an oral settlement agreement, and the other wanted us to testify in support of a breach of contract action or motion to enforce, we refused. Instead, we tried, most often successfully, to resettle the case or to

talk them out of the enforcement effort. This became easier with mounting case law holding that confidentiality trumps oral contract rights.

Let me address the “confidentiality versus oral contract” issue from a policy perspective. It’s a fair debate whether the security provided to litigants through absolute confidentiality is more or less important than adherence to oral agreements reached in our mediations. Both are high values to a court program like this one. My belief is that the Uniform Mediation Act got it right by saying mediation communications are privileged until they are reduced to writing and signed by all parties. Any other approach risks allowing touchy negotiations to devolve into yet more litigation. It also risks ensnaring mediators into breach of contract suits as witnesses. Requiring mediators to take the side of one party against another undermines their reputation and credibility as being absolutely neutral. This would only need to happen once or twice before lawyers would start guarding what they say to mediators as carefully as they guard what they disclose in pleadings and to each other. With that, the program would lose one of the primary benefits it offers to parties trying to negotiate in the heat of litigation.

Virtually everyone in the court—deputy clerks, judges, law clerks, and motions attorneys—understand they can tell us whatever they wish about a case, and that we cannot tell them anything without the consent of all parties. This universal understanding, and the fact that 95% of the mediation work is completed before the case is assigned to a judicial panel, has made it relatively easy to maintain internal confidentiality.

The most challenging situations arise when judges refer a case from the argument calendar. Some have called me directly, some had the courtroom deputy clerk inform us, and some had their law clerks call. Some judges gave details of the case and the issues—even the reasons they thought it should be mediated—and some said very little. In these cases, the temptation to talk about the negotiations can be strong. In all cases, however, judges accepted my short messages reporting on the status or outcome of the mediation without asking questions. I found e-mail to be a good way to communicate since it was much easier to control what I said there than in a conversation.

As an aside, I always handled referrals personally from judicial panels even if they were initially mediated by someone else. As the head of the office, I was the one judges called, the one they saw at meetings, and the one they knew best. This seemed a little unfair to the other mediators whose work and personal successes went mostly unseen by the court, and the judges had a bit of a false impression that I *was* the mediation office. On balance, however, I think limiting the exposure of the office to the full court facilitated clear communication of policies to and from the judges. It also reduced the risks of awkward observations, second-guessing the handling of

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particular cases, and intentional or unintentional micromanagement. It narrowed opportunities for inadvertent disclosures of confidential case information and kept the secrecy of our work real and apparent. Whether or not you continue the practice of mediating all panel referrals yourself, you are probably still going to be the one the judges call when they have an issue.

Finally, our mediation rule explicitly prohibits only disclosures to judges of this court. To extend that confidentiality, the mediators “invite” participants in all mediations to voluntarily agree that they will not disclose anything said in mediation to any court for any reason. Whether that agreement would be enforceable is not certain, but it has helped a great deal to refer to it when we’ve had to convince a party not to make an inappropriate disclosure in the heat of battle. At least one district judge in our circuit quashed a subpoena for testimony from one of our mediators (or dismissed the action, I don’t remember which), citing that agreement as the reason. Incidentally, in all the years I extended that invitation, no lawyer ever questioned it or said no. It almost seems that the more extreme the confidentiality agreement we propose, the more eagerly lawyers agree. That may say something important about how highly lawyers value safety in these talks.

IV. ACCOUNTABILITY: STATISTICAL REPORTING AND EVALUATION

The mediation program was created at a time when civil filings were increasing at an alarming rate. The mission then, as I understood it, was to save judges’ time by promoting settlement of cases that would otherwise require the full range of judicial attention. A Federal Judicial Center (FJC) control group study in the mid-1980s established that this objective was being met. As I said earlier, this goal yielded somewhat over the years to one of the court providing a valued alternative dispute resolution process. that can save time and resources for the parties as well as the court. Under either objective, settlements are the most practical and obvious measure of the program’s success. But they aren’t the only measure of value and may not be the best.

A. Statistical Reporting

Within the office we counted the number of cases mediated, the number of cases settled, and the settlement rate for each mediator on a monthly basis. I tried unsuccessfully, to find a formula that produced a single number incorporating all three of those measures, and that gives added weight to those settlements that produce a higher settlement rate. My reasoning behind

this was that settling 40% of 100 cases represents better mediation success than settling 20% of 200 cases even though the number of settlements is the same. These internal reports showing comparisons among mediators seemed appropriate, and probably added a little motivation by tweaking our professional pride.

In reports to the court, however, we cited only statistics for the office as a whole. My thinking on this, which was never articulated or challenged, was that reporting individual settlement rates outside the office could evoke inaccurate judgments about individuals, invite micromanagement, and create unhealthy pressures on mediators to get numbers up at any cost. I thought our role was to assist parties in resolving their disputes, not to force them to settle. Sometimes the right thing for a mediator to do is to acknowledge a party's non-settlement position, no matter how unreasonable it might seem, and get out of the way so they can pursue a court decision.

In the first years of the program, we decided not to exclude cases we thought would be more difficult or less likely to settle. There were two reasons for this. One was that reliably predicting the settleability of a case at such an early stage of the appeal, without talking to the parties, was nearly impossible. The other was to reduce the opportunity for doubters to accuse us of skimming the easy cases, or those likely to be dismissed anyway, and thus, not really helping to reduce the docket. By selecting randomly from the pool of all eligible cases, we knew, as did the court, that our settlements included those that would otherwise have required the full panoply of appellate review and decision. I have no way of knowing the effect of this policy on our credibility, since only one judge ever admitted to me he had been an early skeptic. I do think, however, that anticipating and answering doubts and questions before they were raised was a good practice.

You will notice that the circuits all seem to select, count, and report on their cases a little differently, which makes comparisons nearly impossible. An exception may be the Tenth Circuit, which I think counts data the same way this court does. Visiting other circuits to explore their ways of doing things could be very beneficial, but be careful about judging yourself by comparisons.

B. Performance Evaluation

By the time you read this, this court will have developed a response to the Judicial Conference's directive to implement some kind of evaluation and performance-based compensation program. I'm not sure yet how we'll do that, but we're in the process and you'll see when you arrive. Merit-based compensation within government has always sounded good. It's hard to

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argue against it. The negative consequences, however, seem to have caught up with such programs in the Executive Branch, and most, if not all, have been terminated after several years of trial. Requirements for merit-based compensation in the Judicial Branch will probably be softened, and it won't surprise me if they are also eventually abandoned.

I have offered to construct merit pay or incentive pay systems in this office over the years, and those offers have been voted down unanimously each time. You probably have your own views on this subject, so I'll just tell you what the history here has been.

The Chief Judge whose idea this program was, and who hired me, had a kind of philosophy of his own. You might call it a management style. He said he hired the very best people he could find, and then turned them loose, and gave them the support they needed to do the very best job they could. It doesn't sound very corporate, but that was exactly what he did for me and it worked very well. I have more or less adopted the same approach within this office. All individuals here are self-starters, like or love their work, and perform it diligently and with a positive attitude.

Creating and implementing a serious, differentiating merit-pay system takes a great deal of time and usually causes a good deal of anguish. In an office this small, where clerical duties are cooperatively shared by several people, and mediators work so independently, a quantifiable rating system would be difficult to apply or even develop. I was never convinced that the benefits of such a system would justify the costs in time and morale. Further, as I said earlier, I didn't think that tying mediators' pay scales directly to settlement rates was a wise idea and I still don't know what other objective measures one could base them on.

What we *have* done to stimulate good work is more in the nature of professional development. We once tried hiring a coach, we periodically go outside the court for training, and we share our own practices with other mediators both nationally in regular "best practices" conference calls and within our office. We have videotaped our own mediations and presented the videos for discussion to the other mediators in the office as a group. In my opinion, these methods were more conducive to improving performance than technical evaluations could be.

In addition, every five years or so we surveyed lawyers who participated in mediations for their appraisal of what we were doing. We usually sent the summaries of those surveys to the judges so they got a sense of the nature and level of satisfaction lawyers had with our work. These surveys were always sent from and returned to the Circuit Executive's office so that he too, had a close read on how the bar valued their experiences with us. Our most recent survey asked lawyers to rate us individually on specific skills. That

data was analyzed and published in an article by Dr. Roselle Wissler,¹ which you can find in the files. Surveys take a lot of time and effort, and it's hard to assess their value, but I think collecting and providing this feedback helped keep us attuned to what the bar wanted from us. It also provided confidence-building assurances to the court without their having to wonder or ask.

Ultimately, accounting for the performance of the mediators and the office is your job. Mediation is a function that is nearly impossible to supervise or evaluate from outside the office because mediators do their unique work autonomously and confidentially. It's also a function with high exposure to the public. The court must rely on the chief circuit mediator to provide both the discretion and the executive skill necessary to assure that the program operates responsibly and well, and to be mindful of the need to maintain public trust and respect for the court as an institution. This is why the position you've just accepted required a minimum of fifteen years of post-law school experience, and why every circuit judge had a vote on your selection. It's also why the line mediator positions call for at least ten years of professional maturation and why I have valued longevity in the job. I sought to hire people who had a deep personal motivation to do this work, and the ambition to do it well. You can judge for yourself, but I think I succeeded.

V. DISTRICT MEDIATOR PROGRAM

I mention this because it's unusual among circuit programs and because it was done with so little fanfare that most of our judges probably know little about it. I refer to Bob Kaiser and the Southern District of Ohio's staff mediator program currently operating out of this office.

It began in 1996, when Judge Rice of Dayton became chief judge, and mentioned in a speech to the Federal Bar Association that he wanted to start a mediation program in the district. He and I, and a district court law clerk spent several years drafting proposals for a mediator position and urging the Administrative Office (A.O.) to fund them. Around that time, I was given permission by then-Sixth Circuit Chief Judge Boyce Martin to support such a mediator with office space and clerical services if the district funded the position. At that time, the district could not find the money in its budget to do so.

Ten years later, then-District Chief Judge Sandra Beckwith, with help from a new district clerk, found the money. The district judges voted to accept our offer and hired Bob Kaiser as their district staff mediator. Bob and

¹ [EDITOR'S NOTE]: Found at 26 OHIO ST. J. ON DISP. RESOL. 271 (2011).

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the program have been looked at, evaluated, and reported as a national model, to the U.S. Supreme Court, the A.O., and the Federal Judicial Center.

In recent discussions about my retirement, Sixth Circuit Chief Judge Batchelder affirmed that the circuit would continue to support the district mediator, and would support another mediator should the district decide to add one, as long as we had the space and resources here to do so. There is a memo in the files to that effect.

Mixing circuit and district resources is unusual as the A.O. typically plans and budgets for these court levels separately. This arrangement has served several useful purposes. It set up a cost-efficient sharing of scheduling functions and conference rooms. It provided colleagues for the lone district mediator with whom he could share problems and ideas. And it exposed the circuit mediators to the perspectives of trial court mediation. If additional justification is needed for using appellate court resources on a district court project, cases are being settled that otherwise would be appealed and added to the circuit's docket.

On a more personal note, I should tell you that I promoted the development of this program and advocated for similar ones throughout the country because I believe federal courts could and should provide a high quality mediation alternative for all civil litigants. Some litigants will seek private mediation on their own, but many will not, either because they can't afford it or because they are too caught up in their adversarial zeal to imagine or suggest it. My advocacy has met resistance beyond simple institutional inertia. Naturally, the Judiciary is concerned with the budget implications of employing mediators in the district courts nationwide. But also there is a growing private mediation sector, including many retired judges, that would prefer for courts to refer cases to them. I have always thought that ordering litigants to pay for private mediation was inappropriate.

VI. POLITICS

Obviously, partisan political activity is strictly prohibited by the Judiciary Code of Conduct and by law. But small "p" politics—the ways people in organizations behave to protect or advance their interests—are another matter. On a national level, the history and complexity of the relationships between the mediation offices and the A.O. and between the mediation offices and the Judicial Conference and its Committees, is too much to try to describe here. They're also important. You will find yourself part of an advisory group comprised of chief circuit mediators, called to meetings in Washington or elsewhere a couple of times a year. The value you gain from regular meetings with Washington officials may be questionable,

but the value of meeting with your fellow chiefs, in my opinion, is not. I will always be happy to tell you what I know or remember about these matters if you ask. I also suggest that you not hesitate to call other circuit chiefs who have been around for awhile. You might start with Dave Aemmer in the Tenth Circuit. Dave has been around longer and has been more closely involved in national administrative issues than almost anyone. He might also offer a little residual loyalty since he started this program with me here twenty-nine years ago before going to the Tenth Circuit.

Internal relationships are a little easier to describe. For two decades, the unit executives (the senior staff) here have adopted a kind of “live and let live” approach toward each other’s offices. Having previously experienced how corrosive and exhausting internal politics can be, we have happily not intruded into each other’s business and have openly cooperated on administrative and budgetary matters. Thus, the court has enjoyed a stable and effective management team, and the senior staff have enjoyed a collegial and supportive work environment. I hope this continues for you.

With changes in personnel and personalities, this collegial environment could change, and practices that have been accepted in the past could be challenged. Here are a few of the things I’ve always thought were important and that might be questioned in a less informed or more politically aggressive environment.

A. The Autonomy of the Office

I view this as very important for three reasons. First, it demonstrates to the public an unmistakable commitment to confidentiality. Second, our effectiveness is directly impacted by litigants’ perceptions of the mediators and the mediation function. I believe sophisticated lawyers and parties would not have viewed mediation in the same way if they saw us as court administrators, staff attorneys, or law clerks, or as having to answer to one. Chief Judge Edwards knew this when he first wrote Sixth Circuit Rule 33 to say that “a circuit judge or mediation attorney may . . .”, and by asking all circuit judges at the beginning of the program to mediate at least one case to demonstrate to the bar how seriously the court took the new role. In any event, being physically and administratively separate from the other administrative offices makes it clear to mediation attendees that this is a unique and trusted independent court operation. The meta message is: The court has faith in its mediators and so can you.

Third, office autonomy keeps the mediation role clear and concentrated. In a couple of other circuits and at other times in the history of these appellate mediation programs, courts have experimented with using

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mediators more as case management staff, sometimes adding non-mediation duties. I think it's safe to say that in all such cases the settlement function suffered. Settlement of cases on appeal requires an intense, sensitive, well choreographed, and often lengthy full court press. Mixing the mediator's role with other duties dilutes his or her energy and focus, and potentially confuses litigants.

B. Budgets

The A.O. has a formula that establishes budgets for our offices based primarily on the number of filings of the types of cases we mediate. Because mediation offices are so small, such that slight changes in filings could necessitate the elimination of a whole staff position, the A.O. has been favorably flexible with the application of our funding formulas. During my time here, funding has not been a problem. This court has mostly kept staffing below authorized levels and thus has enjoyed an annual surplus. Similarly, this office has mostly operated below authorized levels, leaving a little surplus for redistribution as needed.. The Circuit Executive has managed our budget, as well as our personnel records, and whatever we've needed and asked for, which has usually been modest, we've had no trouble obtaining. This has worked well as our relationship with the Circuit Executive was one of mutual trust and support.

Even if you don't involve yourself directly in the court's budgeting process, it would be wise to remain aware of the funding levels allocated by the Administrative Office for this office. That information is provided to you as a unit executive at least annually by the A.O.

C. Control of Briefing

Almost all circuit mediation programs allow the mediators to adjust briefing schedules to accommodate settlement negotiations. This is an extremely valuable tool. My experience has been that once briefs are written, the motivations and probabilities for settlement drop precipitously. While we almost always scheduled mediations immediately after the notice of appeal, negotiations sometimes continue for weeks or months. Our ability to defer the briefing due dates a little at a time, always with consent from all parties, helped keep the lawyers focused on the negotiations rather than the arguments, and saved time and money that could be divided in settlement. It's hard for me to imagine how this office could have been as successful as it has without that ability.

Incidentally, I once worried that someone might challenge this practice as unduly delaying cases for disposition and did a little study of our impact on the length of time it took for appeals to reach termination. That report is in the files, but in a nutshell, the overall delay was very minimal because most cases with lengthy briefing extensions end up settling. Also, as the briefing is delayed for one case, another case moves ahead of it into the pool of fully briefed cases ready for assignment to panels. So, unless there are an insufficient number of cases ready for assignment to hearing panels, these voluntary extensions should not cause problems for anyone.

D. Miscellaneous Activities and Policy Matters

Here are a few more activities and policy matters I thought you might want to hear something about.

1. Bankruptcy Appellate Panel (BAP) Cases

When the Sixth Circuit BAP was being formed in 1996, co-founder Bankruptcy Judge Tom Waldron asked if we would mediate their BAP cases and, of course, I said yes. The new BAP incorporated our mediation rules into their rules and we began mediating BAP appeals the same way we did our circuit cases. The only difference was a self-imposed thirty-day limit on briefing extensions, which we observed fairly consistently. We adopted that limit to accommodate their desire to process cases faster than the district courts, with which whom were competing for cases. They advertised our services as a reason for parties to use the BAP, and have continued to report that they could not keep up with their case load without our help. Not only did this generate goodwill among the bankruptcy bench and bar, but bankruptcy cases generally have been very amenable to mediation. Settlement rate for BAP cases has been nearly 20% higher than the rate for our circuit cases.

2. Telephone Versus In-Person Conferences

The mediators here can tell you of the long history of discussion and experimentation over the relative merits of telephone versus in-person conferences. Suffice it to say that we initially chose telephone conferences to avoid imposing the expense of travel on parties who had not asked for mediation. Though we all intuitively assumed that in-person conferences would be more successful, we have been unable to collect data to reliably confirm that, and in fact telephone conferences have proven to be quite

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effective. As lawyers and their clients increasingly seem to expect to meet in-person for mediation, the burden of travel seems less onerous. Nevertheless, my bias remained with frugality; and telephone mediation, at least for initial conferences, has continued to be the default method unless all counsel work within fifty miles of our courthouse in Cincinnati. In surveys over the years, lawyers' preferences also have continued to favor telephone conferences, though by ever-decreasing margins.

3. Client Participation

Whether client participation in initial conferences should be routinely required has also been much discussed. On the one hand, issues on appeal tend to be more legal and procedural, so arguments over settlement value tend to be more intellectual and lawyer centered. On the other, lawyers can get wrapped up in their own egos and interests if a client isn't present. Again, good arguments can be made either way. Our default has been to encourage lawyers to bring their clients if they think it might aid in reaching settlement, but not to mandate client attendance. Client participation has been growing, and perhaps we should have made an effort to measure the impact of this variable on settlement rates. In any event, my preference was to leave that decision to the lawyers, at least for the initial meeting.

4. Participation with "Authority" and in "Good Faith"

I have viewed a requirement that lawyers have settlement authority at initial mediations as more counterproductive than helpful. Again, one can disagree, as many do. My experience was that parties usually did not arrive at our initial conferences expecting to settle. They have not contracted with us as private mediators to get them to a settlement; they have filed an appeal asking for a decision from the court. Reversing the adversarial momentum at this stage of litigation seems to take time and usually occurs through incremental progress. Participants hear things for the first time in our conferences and experience movement they did not expect. They then must consult with their constituencies of families, board members, or business associates to reassess their expectations. My view was that I'd rather parties come with open minds than with uninformed or arbitrary pre-established settlement positions.

Likewise, some mediation rules require parties to participate in good faith. I've never been clear as to what good faith means and have thought it preferable not to argue about it. Our rules do not and cannot require anyone to settle or even to negotiate if they make an informed choice not to. It just

seemed like a waste of time and energy to invite debates, which lawyers would eagerly start, over whether an opposing lawyer or party has participated in good faith.

In a way, I thought that trying to impose settlement authority or good faith as requirements missed the point. Of course we expected and insisted that participants act with responsibility and decorum appropriate to this formal setting. We did not, however, expect anyone to take any action or agree to anything they didn't see as being in their own best interests. In my view it's the mediator's job to draw from them or to propose ideas and possible compromises that meet those interests. As long as that intent was clear, parties almost always agreed to participate. In those relatively few cases where a party or lawyer could not be enticed into a negotiation, I contented myself (ultimately) to let them go.

5. Volunteer Mediators

Once or twice requests were made for this circuit to add a volunteer component to our program. The D.C. Circuit uses respected lawyer-volunteers from the local bar to mediate most of its cases. Lawyers get status from this and like doing it, and judges like having something they can offer to the lawyers, giving it the appearance of a win-win idea. I was disinclined to establish such a program because it takes a significant amount of time to administer. Most of that time is taken up by recruiting, training, and monitoring volunteers, selecting and referring cases, and fielding problems from a large cadre of volunteers. My informal comparison of the D.C. Circuit's program to ours several years ago convinced me that courts can mediate and settle more cases per dollar and be more assured of quality control with staff mediators than by managing volunteers.

6. Externs

Over the years we have accepted student externs, primarily from the law schools at the University of Cincinnati and the University of Dayton. They don't contribute much to the functioning of the office, but their questions and observations can be refreshing. We have faculty contacts at both schools who have developed some appreciation for the opportunity a placement here offers students and what kind of students are likely to get the most out of it. I've seen this primarily as a kind of community service and a contribution to both the legal and mediation professions.

VII. FINALLY

So there you have it. Unless you have come from another appellate mediation office, nearly every aspect of what this office does will be new, or at least different. The vast majority of what you need to know you can learn from the mediators and staff, most of whom have been here contributing to the formation of the office and its practices for many years. You will find nearly complete institutional memory and knowledge in Deborah and Reasie, the most senior staff.

I have tried to address topics and perspectives unique to my old—and now your new—position. Hopefully we can discuss these and more, but maybe having this in writing will prove useful. In any event, I wish you an enjoyable and profitable experience.

Feel free to call if ever I can help.

Sincerely,

Robert Rack

